

JUL 14 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

V.

SAMUEL VIRGEN GARCIA,

Defendant - Appellant.

No. 05-30318

D.C. No. CR-04-02051-WFN

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, Senior Judge, Presiding

Submitted June 7, 2006**
Seattle, Washington

Before: BEEZER, TALLMAN, and BYBEE, Circuit Judges.

Garcia appeals his sentencing following conviction for conspiracy and distribution of methamphetamine. He claims that the judge abused his discretion when he refused to grant a downward departure on account of Garcia's advanced

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

age. This departure is entirely discretionary and we cannot review it here. *United States v. Smith*, 330 F.3d 1209, 1212 (9th Cir. 2003).

Garcia also claims he was entitled to a downward adjustment on account of his limited role in the drug deal. We may overturn the court's denial of a sentencing reduction for defendant's limited role in the crime only "where the refusal was a clearly erroneous decision." *United States v. Awad*, 371 F.3d 583, 591 (9th Cir. 2004). To qualify for a departure for either a minor or minimal role, a defendant must be "substantially less culpable than the average participant." UNITED STATES SENTENCING GUIDELINES MANUAL. § 3B1.2 cmt. n.3(A) (2004). A "minimal participant" is a defendant who "plays a minimal role in concerted activity" and is less culpable because he lacks "knowledge or understanding of the scope and structure" of the criminal enterprise. *Id.* cmt. n.4 . A "minor participant" is one who is "less culpable than most other participants, but whose role could not be described as minimal." *Id.* cmt. n.5. Garcia was entrusted with a substantial supply of drugs and a large sum of money. He carried out a major sale, carrying out delivery and collecting payment. The judge did not clearly err in finding that Garcia's involvement did not justify a departure.

The judgement of the district court is AFFIRMED.